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APPLYING CRITICISMS OF THE WARREN COURT TO
THE BURGER COURT: A CASE STUDY OF
RICHMOND NEWSPAPERS, INC. v. VIRGINIA

*Erwin O. Switzer**

I. INTRODUCTION

The United States Supreme Court while under the leadership of Chief Justice Earl Warren rendered decisions that had a profound effect on American society. Several series of cases in the areas of desegregation,¹ reapportionment,² and criminal procedure³ forced changes in many state practices. The Warren Court also gave greater recognition to privacy⁴ and free expression⁵ interests. While it invalidated state practices,⁶ the Warren Court upheld federal laws which reached into areas traditionally outside the scope of federal authority, such as statutes outlawing certain types of private

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1. *E.g.*, *Green v. County School Bd.*, 391 U.S. 430 (1968); *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

2. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962).

3. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

4. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

5. *E.g.*, *Brown v. Louisiana*, 383 U.S. 131 (1966); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

6. All of the cases cited in notes 1 through 5 arose from state actions.

discrimination.⁷ Legal scholars were mixed in their views about how much benefit the decisions rendered to society.⁸ Even among scholars who claimed to be sympathetic to the result achieved by the Court, however, there was criticism of the methodology.⁹

Between 1969 and 1980, five of the Warren Court Justices were replaced. Four of the appointments were made by President Nixon,¹⁰ who promised to appoint strict constructionists.¹¹ President Ford made one appointment.¹² This article will review the criticisms of the Warren Court and use one of the major 1980 cases of the Burger Court, *Richmond Newspapers, Inc. v. Virginia*,¹³ to explore the extent to which the Nixon-Ford appointees have changed or continued the decisionmaking practices which provoked Warren Court critics. An opinion written by Chief Justice Warren Burger is especially appropriate for comparison, because of his importance as the Chief Justice and as the first Nixon appointee.

7. The Court upheld title II of the Civil Rights Act of 1964, which prohibited discrimination in public accommodations because of the effect of discrimination on interstate commerce. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

8. For example, Herbert Wechsler felt that the desegregation cases would make a great contribution to society. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 27 (1959). Alexander Bickel on the other hand, felt that *Brown v. Board of Educ.*, 347 U.S. 483 (1954), was headed for "irrelevance." A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 151 (1978).

9. Wechsler, for instance, praised the result in the integration cases, *supra* note 8, but felt that Warren Court decisions in the area of obscenity, the commerce power, freedom of speech, and especially integration were not based on principles that transcended the immediate result. Wechsler, *supra* note 8, at 19-35. Philip Kurland said of Court decisions upholding congressional statutes which outlawed both public and private discrimination, "That this is desirable ought not to be doubted. That it is legitimate is not so easily established." P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 155 (1970) [hereinafter P. KURLAND, *POLITICS*]. In 1964 Kurland stated, "Measuring the desirability of the results decreed, most students of the Court—even the 'nonactivists'—are inclined to approbation." Kurland, *Forward: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 143 (1964) (footnote omitted) [hereinafter Kurland, *Equal in Origin*].

Judge Skelly Wright, on the other hand, argued that methodology cannot be simply removed from the result. He instead advocated decisionmaking analogous to the evolution of common law, where the result is considered and principles develop from a series of cases. Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 778-79 (1971).

10. Chief Justice Burger (1969), Justices Blackmun (1970), Powell (1972), and Rehnquist (1972).

11. F. Graham, *Crucial Choice for Nixon: A New Chief Justice*, N.Y. Times, May 4, 1979, § 4, at 7, col. 1.

12. Justice Stevens in 1975.

13. 448 U.S. 555 (1980).

II. CRITICISMS OF THE WARREN COURT

Warren Court decisions were criticized by scholars for being unprincipled and nonjudicial. Among the leading critics of the Warren Court were Philip Kurland,¹⁴ Alexander Bickel,¹⁵ and Herbert Wechsler.¹⁶ Some of the criticisms were objective, making existence of the objects of the criticism easy to discern. The harshest criticism, however, was reserved for a more subjective characteristic—result-oriented, unprincipled decisions.¹⁷

Among the objective criticisms were two that charged the Court was behaving like a legislature. Kurland, the leading critic on these points, noted the heavy use of amicus curiae briefs.¹⁸ Kurland likened the use of such briefs to a lobbying effort. He pointed out that the Court even requested amicus briefs from the Solicitor General.¹⁹

Both Kurland and Bickel compared the Court to a legislature because of its tendency to make decisions which were not retroactive.²⁰ Especially in the criminal procedure area, the Court overruled prior cases but did not apply the new constitutional principle to individuals convicted under the old rules.²¹ Bickel was especially disturbed by cases in which the petitioner would have a new rule applied to him while petitioners in dozens of other indistinguishable cases pending before the Supreme Court were treated under the old rule of law.²² In such cases, one of which was *Miranda v. Arizona*,²³ Bickel said, "[T]he injustice is plain."²⁴ Kurland tempered his criti-

14. P. KURLAND, *POLITICS*, *supra* note 9; Kurland, *Equal in Origin*, *supra* note 9. Kurland concluded his foreword for the Harvard Law Review article on the 1963 term with this acerbic description of what is fair criticism of the Warren Court:

It behooves any critic of the Court's performance to close on a note reminiscent of the wall plaque of frontier times: "Don't shoot the piano player. He's doing his best." It is still possible, however, to wish that he would stick to the piano and not try to be a one-man band. It is too much to ask that he take piano lessons.

Kurland, *Equal in Origin*, *supra* note 9, at 176.

15. A. BICKEL, *supra* note 8.

16. Wechsler, *supra* note 8.

17. *But see* Wright, *supra* note 9, who argues that result-oriented judicial decisionmaking should not necessarily be criticized.

18. P. KURLAND, *POLITICS*, *supra* note 9, at 191-92.

19. *Id.*

20. *Id.* at 187-90; A. BICKEL, *supra* note 8, at 54-58.

21. P. KURLAND, *POLITICS*, *supra* note 9, at 190.

22. A. BICKEL, *supra* note 8, at 56.

23. 384 U.S. 436 (1966).

24. A. BICKEL, *supra* note 8, at 56. One could say the injustice is just as plain when common-law courts engage in the same practice, as they usually do. If one accepts Judge Wright's view of constitutional adjudication as being analogous to common-law adjudication, *supra* note 9, the application of decisions without retroactivity should be expected.

cism of both the use of amicus briefs and nonretroactive decisions by purporting to be nonjudgmental about the wisdom of the practices.²⁵ However, he did list the problems created by a Court that joins the executive and legislative branches in making national policy.²⁶

The scholars also charged that the Warren Court misused history. Bickel accused the Court of "[w]illful simplification of history."²⁷ Although he stopped short of calling the Court's use of history "almost surely wrong,"²⁸ Bickel thought the Court oversimplified history when it found historical support for a reading of the fourteenth amendment which upheld a special provision of the Voting Rights Act²⁹ and a reading of the thirteenth amendment which upheld Congress' power to outlaw private racial discrimination in real estate.³⁰ (Indeed, Bickel questioned whether history supported the Court's interpretation of the Civil Rights Act of 1866 as intending to prohibit such discrimination).³¹ Bickel also criticized the Court for aiming to "prov[e] the unprovable" in its attempt to justify *Miranda* on the basis that the Court was merely applying long-recognized principles.³² Kurland thought that the Justices, in supporting their opinions on racial cases, found a greater egalitarian history in the United States than actually existed.

Another of Bickel's criticisms was that majority opinion writers would fail even to address important points raised in dissenting opinions.³³

Kurland criticized the Warren Court for its contribution to the

Bickel could argue that constitutional adjudication should not be handled this way for jurisprudential reasons, but he should not have relied simply on the fact that the result is unjust. Paul Mishkin noted that the reason full retroactivity of decisions was the rule before the days of the Warren Court was probably that the Justices believed it "obvious" that whatever the Court holds to be the law of the Constitution becomes "what always has been the law." Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 57 (1965). Kurland has also noted the distinction between the common-law judicial legislation and constitutional adjudication. P. KURLAND, *POLITICS*, *supra* note 9, at 177.

25. P. KURLAND, *POLITICS*, *supra* note 9, at 190, 192.

26. *Id.* at 195-204.

27. A. BICKEL, *supra* note 8, at 47.

28. *Id.* at 49.

29. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court, according to Bickel, held that section 5 of the fourteenth amendment enables Congress to supplement, rather than merely implement, the guarantees of that amendment. A. BICKEL, *supra* note 8, at 48.

30. A. BICKEL, *supra* note 8, at 49 (citing *Jones v. Mayer Co.*, 392 U.S. 409 (1968)).

31. *Id.*

32. *Id.* at 49-50.

33. *Id.* at 73-75.

decline of federalism.³⁴ He thought the Court had gone further than any post-Marshall Court in this matter³⁵ with its decisions in labor law,³⁶ federal jurisdiction and choice of law,³⁷ defamation,³⁸ the commerce power,³⁹ racial discrimination,⁴⁰ and criminal procedure.⁴¹

Bickel, Kurland, and Wechsler also condemned the use of per curiam opinions in areas of unsettled law. The Court was most faulted for this practice in the obscenity and desegregation cases. In the obscenity area, the Court failed to establish standards for movie censorship by simply reversing per curiam five decisions which had upheld film censorship.⁴² They were the first cases to arise after the Court decided movies were protected by the first amendment.⁴³ Wechsler questioned whether such unexplained decisions were at all defensible.⁴⁴ There was also criticism of the per curiam orders which followed *Brown v. Board of Education*.⁴⁵ The Court in *Brown* prohibited state-segregated schools, relying in part on the importance of the educational process.⁴⁶ The Court in the next few years extended—by per curiam decisions—the rule of *Brown* to public transportation, parks, golf courses, bath houses, and beaches.⁴⁷ Wechsler thought these orders deserved principled decisions.⁴⁸

34. P. KURLAND, *POLITICS*, *supra* note 9, at ch. 3.

35. *Id.* at 59-60.

36. *Id.* at 60-61.

37. *Id.* at 61-63.

38. *Id.* at 63-64.

39. *Id.* at 64-66.

40. *Id.* at 69-73.

41. *Id.* at 73-83.

42. *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957), *rev'g per curiam*, 244 F.2d 432 (7th Cir. 1957); *Holmby Prod., Inc. v. Vaughn*, 350 U.S. 870 (1955), *rev'g per curiam*, 177 Kan. 728, 282 P.2d 412 (1955); *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954), *rev'g per curiam*, 159 Ohio St. 315, 112 N.E.2d 311 (1953); *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954), *rev'g per curiam*, *Commercial Pictures Corp. v. Board of Regents*, 305 N.Y. 336, 113 N.E.2d 502 (1953); *Gelling v. Texas*, 343 U.S. 960 (1952), *rev'g per curiam*, 157 Tex. Crim. 516, 247 S.W.2d 95 (1952).

43. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

44. Wechsler, *supra* note 8, at 21.

45. 347 U.S. 483 (1954).

46. *Id.* at 493-94.

47. *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958), *aff'g per curiam*, 252 F.2d 122 (5th Cir. 1958); *Gayle v. Browder*, 352 U.S. 903 (1956), *aff'g per curiam*, 142 F. Supp. 707 (M.D. Ala. 1956); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), *rev'g per curiam*, 223 F.2d 93 (5th Cir. 1955); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955), *aff'g per curiam*, 220 F.2d 386 (4th Cir. 1955); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954), *rev'g per curiam*, 202 F.2d 275 (6th Cir. 1953).

48. Wechsler, *supra* note 8, at 22.

Kurland said the Court in these cases "took the easy way out."⁴⁹ Bickel said of the per curiam orders: "[They] fail to build the bridge between the authorities they cite and the results they decree."⁵⁰

In addition to these objective criticisms, the scholars attacked Warren Court decisions as unprincipled. Decisions were criticized for not having a sound basis in the Constitution,⁵¹ lacking precedential authority,⁵² (going so far as to overrule even the Warren Court's own decisions),⁵³ and failing to develop principles useful for future decisions.⁵⁴

Before applying the Warren Court criticisms to *Richmond Newspapers*, the facts and opinions in that case should be summarized.

III. *RICHMOND NEWSPAPERS, INC. v. VIRGINIA*

In *Richmond Newspapers* the Court faced the issue of whether there is a right under the first amendment for the press and public to attend criminal trials. The Court found that such a right presumptively exists.

The case arose from a murder trial in Virginia. The defendant was about to begin his fourth trial on a second-degree murder charge.⁵⁵ Before the trial began, the defendant moved that it be closed to the public. He feared that jurors would get improper information, such as testimony from prior trials, from persons in attendance or the media. The trial court closed the courtroom to the press and public. Although two reporters for *Richmond Newspapers* were in the courtroom when the closure was ordered, they made no objection. Later in the day *Richmond Newspapers* sought a hearing on a motion to vacate the closure order, and the hearing was held at the end of the day's trial proceedings.

49. P. KURLAND, *POLITICS*, *supra* note 9, at 124.

50. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

51. P. KURLAND, *POLITICS*, *supra* note 9, at 91-92, 179-82; *see also* text accompanying notes 28-30, *supra*.

52. A. BICKEL, *supra* note 8, at 54; P. KURLAND, *POLITICS*, *supra* note 9, at xxii, 90-91, 106-07.

53. P. KURLAND, *POLITICS*, *supra* note 9, at 186-87.

54. Wechsler, *supra* note 8, at 24-35; A. BICKEL, *supra* note 8, at 50, 60-61, 86-87; P. KURLAND, *POLITICS*, *supra* note 9, at 91, 182-83.

55. A conviction in the first trial was reversed by the Virginia Supreme Court because of improperly admitted evidence. The second trial ended in a mistrial when a juror asked to be excused after the trial had begun and no alternate was available. A third trial also ended in a mistrial, apparently because a prospective juror had read about the defendant's case in a newspaper and told other jurors about the case. 448 U.S. at 559.

According to the transcript of the hearing, the trial court agreed with the defense counsel that the open trial would infringe the rights of the defendant. The prosecutor made no objection to the closure. No express findings were made by the trial court when it denied the motion to vacate the closure order.⁵⁶

After the trial, Richmond Newspapers appealed the closure order to the Virginia Supreme Court. That court denied the petition for appeal. The United States Supreme Court granted certiorari to Richmond Newspapers' petition.

The eight Justices who heard the case⁵⁷ produced seven opinions. Seven Justices voted to reverse the Virginia Supreme Court; Justice Rehnquist was the lone dissenter. Chief Justice Burger wrote the opinion of the Court, but was joined by only two Justices, Justices White and Stevens, both of whom filed concurring opinions. Justices Brennan, Stewart, and Blackmun each filed opinions which concurred only in the judgment, with Justice Marshall joining Brennan. The seven to one vote breaks down to a 3-2-1-1 to 1 vote. The concurrences of Justices White and Stevens, who joined Burger's opinion, make the result even more divided than those numbers make it appear. The opinions reflect some agreement, but a brief summary of the distinctions between the opinions is appropriate.

Burger held that there is an implicit first amendment right to attend criminal trials which can be denied only when there is an overriding interest articulated in findings. The opinion leaves unclear what "overriding" means.⁵⁸ Burger distinguished a 1979 case, *Gannett Co. v. DePasquale*,⁵⁹ which had rejected a publisher's claim of a sixth amendment right to attend a pretrial hearing. *Gannett* had not addressed the issue of whether there is a first amendment right⁶⁰ of access to trials. Burger distinguished *Gannett* on the basis that *Gannett* dealt with a pretrial hearing and was a sixth amendment case. Burger's first amendment analysis emphasized a history of access to criminal trials and analogized a courtroom to traditional public forums (like streets and parks).

56. *Id.* at 559-61. On the first day of the trial the court struck the state's evidence, sustained the defendant's motion for a mistrial, and declared the defendant not guilty. *Id.* at 561-62.

57. Justice Powell did not participate.

58. An "overriding interest" might be read as requiring a strong interest, but it also could be read as merely describing any interest which happens to outweigh another. See text accompanying notes 87-88 *infra*.

59. 443 U.S. 368 (1979).

60. The Court in *Gannett* assumed *arguendo* that a first amendment right existed because regardless of the scope of the right, it was overridden in that case. *Id.* at 392-93.

In White's concurrence to Burger's opinion, the Justice bemoaned the fact that *Richmond Newspapers* was necessary. He thought that *Gannett* had been wrongly decided on the sixth amendment issue, but given the result in that case, he agreed with Burger's first amendment analysis.⁶¹ Stevens, who, like White, joined Burger's opinion, thought that the first amendment analysis was correct because it followed the thrust of Stevens' argument in dissent in *Houchins v. KQED, Inc.*⁶² Stevens said that *Richmond Newspapers* stands for the proposition that the government cannot arbitrarily interfere with "access to important information."⁶³ Burger had written the Court opinion in *Houchins* (for a three-Justice plurality on a seven-Justice Court with Stewart concurring in the judgment) in which he refused to grant the press and public a constitutional right of access to a prison. Stevens found *Gannett* distinguishable.⁶⁴

Brennan concurred only in the judgment. He wrote an opinion which contained his own first amendment analysis, and concluded that the first amendment granted the public a right of access to trials. Brennan differed from Burger in emphasizing the importance of meaningful communication in a system of self-government. Brennan was more concerned with the effect of trial information dissemination on democratic institutions, rather than on the peculiarities of the criminal trial. Brennan thought that since civic responsibility and respect for the rule of law are fostered by open trials⁶⁵ and since the first amendment is intended to ensure communications necessary for democracy,⁶⁶ the first amendment creates a presumptive right of access to trials. He found the history of open trials so deeply ingrained in America's tradition that it is part of the country's democratic fiber. Brennan did not distinguish between civil and criminal trials.⁶⁷ He admitted that some interests may rebut the presumption of access, but he did not suggest what those interests could be.⁶⁸ Although both Brennan and Marshall dissented in *Gannett*, Brennan did not comment on the correctness of

61. For further discussion of White's opinion, see text accompanying note 147 *infra*.

62. 438 U.S. 1, 19 (1978).

63. 448 U.S. at 583.

64. For further discussion of Stevens' opinion, see text accompanying notes 142-43 *infra*.

65. 448 U.S. at 587-88, 593-95.

66. *Id.* at 587-88.

67. *Id.* at 596.

68. *Id.* at 598.

that decision.⁶⁹

Stewart also used his own first amendment analysis in his concurrence in the judgment. He used a public forum analysis to conclude that a courtroom is more like a traditional public forum (such as a street or park) than a non-public forum (such as a military base or jail). Therefore, Stewart concluded, the government can only impose reasonable time, place, and manner restrictions, rather than impose an absolute prohibition on access.

Stewart's opinion differed from Burger's in that Stewart saw no distinction between civil and criminal trials, and he incorporated into his public forum analysis restrictions on the right to access. Burger, on the other hand, discussed restrictions on the right to access in a part of the opinion not dealing with the public forum analysis.⁷⁰ Stewart also differed from Burger in discussing the matter in terms of a "freedom to listen"⁷¹ as opposed to Burger's discussion of a "right of assembly."⁷² It is unclear whether this is a significant distinction. Stewart did not mention any particular language in Burger's opinion that prevented him from joining Burger's opinion. Stewart's analysis differed from Stevens' in that Stewart emphasized the place from which the information flows, rather than the type of information flowing.⁷³

Blackmun, who wrote the dissenting opinion in *Gannett*, thought that *Richmond Newspapers*, like *Gannett*, should have been a sixth amendment case. He conceded that the first amendment offers more protection of public access to trials, but he did not develop a first amendment analysis. In this way, Blackmun's opinion is like White's one-paragraph concurrence joining Burger's plurality opinion. Blackmun differs from White, however, by not joining any other opinion. It is not clear whether Blackmun's belief in a first amendment right of access is grounded in the reasons offered by Burger (history of open criminal trials), Stevens (prohibition of state interference with information dissemination), Brennan (importance of trial communications to democratic institutions), or Stewart (right to listen in a public forum). Furthermore, Blackmun considers the first amendment justification as secondary to the sixth amendment,

69. For a comparison of Burger's and Brennan's opinions, see text accompanying note 118 *infra*.

70. 448 U.S. at 576-77.

71. *Id.* at 599 n.2.

72. *Id.* at 577.

73. For a comparison of Burger's and Stewart's opinions, see text accompanying notes 103 and 141 *infra*.

even though *Gannett* rejected the latter.⁷⁴

Rehnquist was the lone dissenter, refusing to find either a first or sixth amendment right of access.⁷⁵

IV. ANALYSIS USED BY THE COURT

In order to employ Kurland-Bickel-Wechsler scrutiny on *Richmond Newspapers*, the structure of the Burger opinion and the analysis Burger used to reach his conclusion will be examined. The first sentence of Burger's opinion suggested he was not going to lay down a broad principle which would have easy application to a different set of facts. Implicitly rejecting the Wechsler notion that a case should develop a principle with application beyond the strict holding,⁷⁶ Burger stated, "The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution."⁷⁷

After a brief review of the facts, Burger distinguished a case which might have been expected to be dispositive in *Richmond Newspapers*, the *Gannett* case. The first distinction from *Gannett* which the Chief Justice raised was that *Gannett* involved a pretrial hearing rather than the trial itself. He cited his own *Gannett* concurrence, even though it was not joined by any of the other Justices, which emphasized that *Gannett* did not involve a trial. Burger did not explain, either in *Richmond Newspapers* or in *Gannett*, why he joined the opinion of the Court in *Gannett* notwithstanding that it repeatedly referred to access to the trial itself.⁷⁸ Nevertheless, Burger apparently found the pretrial status of *Gannett* to be the principal distinction. Later in the opinion, Burger distinguished *Gannett* because it raised a sixth amendment issue.⁷⁹ The *Gannett* Court assumed that there is a first amendment right to attend trials, but found the defendant's fair trial right had outweighed it. Burger then proceeded to find the right to attend trials which *Gannett* had assumed, *arguendo*, existed.

74. 448 U.S. at 603. For further discussion of Blackmun's opinion, see text accompanying notes 144-48 *infra*.

75. 448 U.S. at 604. For further discussion of Rehnquist's opinion, see text accompanying notes 104-05 *infra*.

76. See note 54 *supra*. See also Wechsler, *supra* note 8, at 19.

77. 448 U.S. at 558 (emphasis added).

78. Justice Blackmun noted in his *Richmond Newspapers* concurrence that the *Gannett* Court opinion mentioned at least 12 times that the rule of the case applied to the trial itself. *Id.* at 601-02.

79. *Id.* at 564.

Burger found the first amendment right to attend trials by first looking to the history of the criminal trial in the Anglo-American judicial system. Going back to the time before the Norman Conquest, he found a tradition of the presumptive openness of trials. Citing authorities like Blackstone and Wigmore, he stated that history forced him to conclude that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."⁸⁰ Justice Blackmun, who in concurrence criticized the Chief Justice for his trial/pretrial distinction,⁸¹ praised him for his use of history.⁸²

Having found an historical basis for an open trial, Burger looked to the Constitution for such a right. The first link between the history and the Constitution is that the government's power to limit information to the public is circumscribed by the first amendment when that limitation arbitrarily denies information to which the public historically has had access.⁸³ Burger left unclear the type of limitation of information which would trigger circumscription by the first amendment and the extent of the circumscription.

The second link requires that an analogy be drawn between the courtroom and a traditional public forum. Just as the rights of speech, press, and assembly are subject to only narrow restrictions in places of their traditional exercise, such as streets and parks, an historically open courtroom is a place where the public has a right to be subject only to those narrow restrictions.⁸⁴

The next point Burger made is that even without being explicitly mentioned, there is a right to attend criminal trials implicit in the first amendment. He suggested that this is one of the "fundamental rights . . . indispensable to the enjoyment of rights explicitly defined."⁸⁵ Apparently he found this fundamental right in the history of the criminal trial. Blackmun noted in concurrence that the plurality relied on "a cluster of penumbral guarantees" to find the

80. *Id.* at 573.

81. *See* note 78 *supra*.

82. 448 U.S. at 601.

83. *Id.* at 575-76. Compare this language to Stevens' concurrence while joining Burger: "[T]he Court *unequivocally* holds that an arbitrary interference with access to *important* information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 583 (emphasis added). Stevens said "important" while Burger emphasized historical access.

84. *Id.* at 577-78. For the distinction between this part of the opinion and Stewart's concurrence, *see* text accompanying notes 70-72 *supra*, and 103 and 141 *infra*.

85. 448 U.S. at 580.

first amendment right.⁸⁶

Burger concluded by applying the principle of a right to attend trials to the facts of the case. Burger noted that in contrast to the *Gannett* trial court, the *Richmond Newspapers* trial court did not recognize the right of public attendance. He further noted that there was no consideration of alternatives. Burger added one sentence to guide lower courts in weighing competing rights when the courts are recognizing the public's right and considering alternatives: "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."⁸⁷ Even this statement offered as guidance leaves confusion. Earlier in the opinion Burger stated that the issue to be determined was when "closure is required to protect the defendant's superior right to a fair trial, or . . . some other overriding consideration. . . ."⁸⁸ It is unclear whether "overriding" indicates that the opposing interest must be great, or is merely a description of the type of interest which happens to outweigh the public's right of attendance.

In summary, Burger's opinion emphasized the narrowness of the issue, searched historical records to find a fundamental and constitutional right necessary to preserve explicit constitutional rights, applied the right to the facts, and concluded that since it had been ignored it must have been violated. Little, if any, information is given to indicate when the right will be violated if it is not ignored. The opinion shows many of the faults which Kurland, Bickel, and Wechsler found in Warren Court decisions. Some of these criticisms are levelled by other Justices in their *Richmond Newspapers* concurrences.

V. A KURLAND-BICKEL-WECHSLER CRITIQUE OF *RICHMOND NEWSPAPERS*

Although the opinion of the Court in *Richmond Newspapers* shows some improvement over the Warren Court by Kurland-Bickel-Wechsler standards, many Warren Court characteristics remain. The opinions of the other Nixon-Ford appointees shed light on their views of the Kurland-Bickel-Wechsler criticisms.

86. *Id.* at 603.

87. *Id.* at 581.

88. *Id.* at 564.

A. *Objective Criticisms*

Among the criticisms which are easiest to analyze, *Richmond Newspapers* shows improvement over the Warren Court.

On the issue of the use of amicus curiae briefs, it is difficult to evaluate the Burger Court. In *Richmond Newspapers* eight amicus briefs were filed.⁸⁹ According to the rules of the Court, however, the briefs could be submitted as a matter of right. The rules permit amicus curiae briefs when all the parties consent, on order of the Court when there is not consent,⁹⁰ or when submitted by the Solicitor General or a state.⁹¹ In *Richmond Newspapers* seven of the briefs were submitted by consent of the parties, and the other was submitted by New Jersey. Therefore, the large number of briefs was not the result of discretion. However, those same rules existed verbatim for the Warren Court,⁹² suggesting that this criticism of the Warren Court may be unfair.

Another of the objective criticisms which is applicable to *Richmond Newspapers* is the rendering of a decision of entirely prospective application. The Court was willing to hear a moot case because of the nature of the complaint (trials would almost always be over before the Supreme Court would decide a case) and the situation would likely be repeated.⁹³ Nevertheless, the decision had no effect on the case before the Court. It is hard to fault the Court for taking a case like *Richmond Newspapers*, however, since it was extremely unlikely that the case would reach the High Court during a trial. Not even the dissent faulted the Court on this point.

The Court can be faulted, however, for not producing a majority opinion. The confusion caused by the many concurrences is discussed in section VI below. For present purposes, however, suffice it to say that when the Court reaches out to decide a case that is arguably nonjustifiable, and the reason for reaching out is that the case is capable of repetition, the Court should produce a decision that states the law on the subject matter. When no more than three Jus-

89. Three of the briefs were in support of the jurisdictional statement. One was submitted by a conglomeration of journalism groups, a second by the American Civil Liberties Union, and the third by the American Newspaper Editors. The other five went to the merits. They were submitted by a group of fifty-six newspapers and three networks, the State of New Jersey, and the three groups who submitted jurisdictional briefs. U.S. Supreme Court Records and Briefs. Information Handling Services.

90. SUP. CT. R. 36.1, 28 U.S.C.A. (West Supp. 1981) (jurisdictional briefs); *id.* at 36.2 (briefs on merits).

91. *Id.* at 36.4.

92. *See, e.g.*, SUP. CT. R. 42, 28 U.S.C. (1964).

93. 448 U.S. at 563.

tices join an opinion, the case's future usefulness is severely limited, if not destroyed. The future usefulness of the case is diminished even further when the plurality emphasizes the narrow set of facts to which the decision applies.⁹⁴

The use of history by Burger is an improvement over the Warren Court. When Earl Warren could not find historical evidence that the framers of the fourteenth amendment intended to prohibit segregated schools, he called the historical record "inconclusive."⁹⁵ Burger, on the other hand, presented a well-documented history of the nature, purpose, and practice of criminal trials in the Anglo-American judicial system. None of the other Justices, not even the dissenter, challenged the accuracy of the historical record. Brennan's concurrence emphasized different historical evidence, but that is because Brennan saw the case as having implications beyond the criminal trial setting. The harshest criticism of Burger's use of history is that it might not be relevant to a constitutional decision.⁹⁶

Another objective criticism is the failure of Court opinions to respond to points raised by the dissent. Although this problem is not present in *Richmond Newspapers*, a related problem does occur, *i.e.*, failure to respond to concurrences. The dissent's criticism, that the case takes power from the states because of the inclination of the Justices, was addressed by the whole opinion as the Court attempted to show the source of authority for the right-of-press-access cases in nontrial settings. Stevens, who concurred and joined Burger's opinion, suggested that the Court is embracing a philosophy of press access which he and Justice Powell had espoused in dissent.⁹⁷ The Court had previously rejected a right of press access to prisons⁹⁸ and prisoners.⁹⁹ Stevens said those cases implied that any governmental restriction on access to information, no matter how severe or unjustified, is constitutional as long as the press is not treated worse than

94. *Id.* at 558. The plurality opinion in *Richmond Newspapers* may be as narrow as simply ordering that findings be put on the record. See text accompanying notes 130-32 *infra*.

95. *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954). Warren's historical analysis was actually an exploration of why the record was unreliable, rather than a presentation of any evidence to support affirmatively the decision of the Court. *Id.* at 489-90.

96. See text accompanying notes 117-19 *infra*.

97. It is hard to believe that Justice Stevens really thought that that was what Burger was doing, since Burger had written the plurality opinion in the case in which Stevens dissented, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

98. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

99. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

the public at large. That clearly seemed to be the holding, at least as related to prisons. Stevens contended that *Richmond Newspapers* rejects this principle.¹⁰⁰ Burger's reference to these right of access cases is simply to note that it does not matter whether *Richmond Newspapers* deals with a "right of access" issue,¹⁰¹ and to distinguish prisons from courtrooms.¹⁰² He did not give us guidance, however, about whether the right of access to trials is part of a general rule of access to government information or is an exception to a general rule of no right of access to government information. Additionally, both Burger and Stewart can be faulted for not noting the distinction between their public forum analyses.¹⁰³

A final objective criticism is the fostering of federal power at the expense of the states. To some extent the issues involved in this criticism, *i.e.*, whether the intrusion into state power is justified, touch on the criticisms of the use of principles, and are further explained in Section V.B. below. It is appropriate to note, however, that the decision in *Richmond Newspapers* seriously affects the exercise of state power. This objection is one of the two main points of Rehnquist's dissent. He referred to the diversity of the fifty states as a "healthy pluralism."¹⁰⁴ He called "unhealthy" the degree of authority exercised during the past generation by "a small group of lawyers who have been appointed . . . and enjoy virtual life tenure" and who are a "tiny numerical fragment of the 220 million people who compose the population of this country."¹⁰⁵ Rehnquist also objected to the arbitrary balancing that will be needed to apply *Richmond Newspapers*. Rehnquist's opinion juxtaposed the objection to reducing state power with the objection to the arbitrary balancing *Richmond Newspapers* calls for, suggesting that the promotion of federal authority is justified only when there are clearly defined, objectively applicable constitutional provisions.

Burger was not reluctant to champion federal authority because of a lack of explicit constitutional authority. In his argument that a right to attend trials is fundamental and implicit in the first amendment, Burger cited eight cases in a footnote which increased federal

100. 448 U.S. at 582-83.

101. *Id.* at 576. Burger also chose not to characterize *Richmond Newspapers* as a "right to gather information" case, per *Branzburg v. Hayes*, 408 U.S. 665 (1972) (denying a first amendment claim of reporters to withhold confidential sources from a grand jury).

102. 448 U.S. at 576 n.11.

103. See text accompanying notes 70-72 *supra*.

104. 448 U.S. at 606.

105. *Id.*

authority at the expense of the states; four of them are Warren Court cases.¹⁰⁶ Burger apparently is not going to join the Kurland camp on the federalism issue.

B. *Criticisms of Principles*

The other criticisms are more subjective and go to the constitutional basis, precedential development, and future usefulness and clarity of principles of constitutional adjudication. These criticisms require a more thorough analysis of the opinions at hand and prior opinions.

1. *Constitutional Basis of the Principle*

The first matter is to determine the source of the principle of *Richmond Newspapers*. The principle as stated by Burger is that there is a qualified right to attend criminal trials.¹⁰⁷ Although he called this right "implicit in the guarantees of the First Amendment,"¹⁰⁸ he also appeared to rely on the ninth amendment and, as suggested by Blackmun, "penumbras."¹⁰⁹ The word "penumbra" is reminiscent of Justice Douglas' opinion in *Griswold v. Connecticut*,¹¹⁰ which relied on the penumbras of the third, fourth, fifth, and ninth amendments to find a right of privacy.¹¹¹ *Griswold* was criticized by Kurland for this approach because it lacked a constitutional basis.¹¹² By citing *Griswold* and other cases to justify the implied right to attend trials,¹¹³ Burger seemed to be rejecting the validity of the criticism of *Griswold*.

Burger rejected Virginia's contention that since the Constitution does not spell out a right to attend trials there is no such right. He based the rejection on two factors. The first, expressed in a footnote, is that the ninth amendment was intended to allay the fear that

106. *Taylor v. Kentucky*, 436 U.S. 478, 483-86 (1978) (presumption of innocence); *Estelle v. Williams*, 425 U.S. 501 (1976) (same); *In re Winship*, 397 U.S. 358 (1970) (standard of proof beyond a reasonable doubt); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (right to interstate travel); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to privacy); *United States v. Guest*, 383 U.S. 745, 757-59 (1966) (right to interstate travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (right of association).

107. 448 U.S. at 580-81.

108. *Id.* at 580.

109. *Id.* at 603.

110. 381 U.S. 479 (1965).

111. *Id.* at 484.

112. P. KURLAND, *POLITICS*, *supra* note 9, at 93.

113. *See* cases cited note 106 *supra*.

expressing certain guarantees in the Bill of Rights would be read as excluding others.¹¹⁴ The second factor is the practice of the Court in acknowledging implied rights, such as those of association, privacy, the presumption of innocence, and the right in a criminal trial to be judged by a standard of proof of guilt beyond a reasonable doubt.¹¹⁵ Burger called these rights "fundamental" as "indispensable to the enjoyment of rights explicitly defined."¹¹⁶

By using these two factors, Burger has left unclear exactly how he derived the right to attend trials. His exposition of the history and policy behind the criminal trial would be relevant to a conclusion that an open trial is one of the rights the framers forgot to include in the Bill of Rights, and is therefore included as one of the rights "retained by the people."¹¹⁷ Burger did not go that far, however, and he referred to the ninth amendment only in a footnote. It would have been remarkable for Burger to rely on the ninth amendment since the Supreme Court has not yet held that a particular constitutional right flows solely from the ninth amendment.

Instead, Burger argued that the right of attendance is indispensable to the enjoyment of explicit first amendment rights. He provided no basis for this conclusion, however. His use of the history of trials is irrelevant to the first amendment. A history of how open trials would promote freedom of speech or the press would be relevant. Indeed, Brennan's concurrence looked at the historical record of newsgathering and its role in a democratic society,¹¹⁸ and then found open trials essential to the newsgathering interest.¹¹⁹ Burger, on the other hand, offered evidence concerning why justice requires open trials; his historical analysis did not demonstrate how speech or press interests of the first amendment require openness. By focusing on justice, rather than on first amendment speech or press interests, Burger's opinion does not appear to imply a right of press access in out-of-court settings. Since Stevens argued that *Richmond Newspapers* does have implications beyond courtrooms, this avoidance of the relevance of other settings apparently was embraced only by Burger and White.¹²⁰

Other Justices questioned the constitutional derivation of the

114. 448 U.S. at 579 n.15.

115. *Id.* at 579; see cases cited note 106 *supra*.

116. 448 U.S. at 580.

117. U.S. CONST. amend. IX.

118. See text accompanying notes 65-69 *supra*.

119. 448 U.S. at 596-97.

120. Stevens nevertheless joined Burger's opinion.

right to attend trials. Rehnquist rejected the idea that there is a right of attendance in the first, sixth, or ninth amendments.¹²¹ Blackmun called Burger's use of the "speech clause of the First Amendment, the press clause, the assembly clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions" a "veritable potpourri."¹²²

In sum, Burger's derivation of his principle seems no different from the practices of the Warren Court. He weighed policy matters unrelated to the basis of his holding, *e.g.*, the policy reasons behind open trials for promoting a fair judicial system was the basis for a right of access based on freedom of speech. Even if the policy arguments were, like Brennan's, relevant to the Constitution, Burger could still be criticized for finding a right simply because of its relationship to an explicit right. Implying such a right could have been justified only if Burger had shown how closed trials would negatively affect the flow of information under first amendment ideals.

2. *Precedential Support for the Principle*

When evaluating the Court's use of principle, its consistency with prior cases, the principles of cases on which it relies, and the cases which appear relevant but are not used must be examined. Therefore, in *Richmond Newspapers* the determination of what *Gannett* appeared to stand for in 1979 and what it stands for now is important. Also, the effect of *Richmond Newspapers* on the *Houchins v. KQED, Inc.*¹²³ line of cases dealing with press access in out-of-court settings is relevant. Finally, the other cases cited in *Richmond Newspapers* must be scrutinized. A search for a neutral principle from the cases should be conducted before an evaluation of the usefulness and clarity of the principle is made.

In a five to four opinion in *Gannett*, the Court had held that the public has no sixth amendment right to attend a criminal pretrial proceeding. At the end of the opinion the Court addressed the issue whether there is a first amendment right to attend such a proceeding. That portion of the opinion explained that the issue was whether cases denying a right of press access—*Houchins*, *Pell v. Procunier*,¹²⁴ and *Saxbe v. Washington Post Co.*¹²⁵—should be lim-

121. 448 U.S. at 605.

122. *Id.* at 603.

123. 438 U.S. 1 (1978).

124. 417 U.S. 817 (1974).

125. 417 U.S. 843 (1974).

ited to prisons.¹²⁶ The *Gannett* Court then avoided the issue by concluding that balancing is appropriate and was conducted properly by the trial court.

Gannett's strict holding is a negative holding, *i.e.*, there is not an absolute right of the public or the press to attend pretrial hearings. The holding did not affirmatively state the existence of any first amendment right. The Court actually referred to the issue in the context of a criminal "trial;"¹²⁷ it did not suggest a difference in trials as opposed to pretrial hearings. Burger's partial reliance on this point to distinguish *Gannett* and *Richmond Newspapers* is not legitimate. None of the other eight Justices joined in his concurrence on this distinction. Furthermore, even Burger's concurrence appears to go to the sixth amendment issue, not the first amendment issue.

Gannett begged the question decided by *Richmond Newspapers*. It is surprising in retrospect how little guidance *Gannett* gave to *Richmond Newspapers*. Both the Court and the dissent in *Gannett* avoided deciding the issue of whether there is a first amendment right to attend trials. *Gannett* was carefully worded to avoid a decision on the first amendment issue, leaving little with which *Richmond Newspapers* could be inconsistent. *Gannett* deserves criticism for avoiding an issue relevant to the case by skipping the underlying issue—whether the right exists.¹²⁸

Still, even when *Gannett* and *Richmond Newspapers* are read together, they do not contribute much to understanding a clear principle. *Richmond Newspapers* holds that there is a right to attend trials which cannot be ignored. *Gannett* holds that under the facts of its case the right was overcome. Worse, Burger wrote a history of the criminal trial to show there is a cherished right to attend trials, but he does not explain why that cherished right was overcome in *Gannett*. Although the cases are not necessarily inconsistent, the tone of *Richmond Newspapers* is one of promoting press access to courtrooms, while the *Gannett* Court felt that two paragraphs were enough to explain why a right of access was overridden.¹²⁹

Gannett said first amendment interests were overcome because

126. 443 U.S. at 391-92.

127. *Id.* at 393.

128. For criticism of this avoidance, see Reznick, *Gannett Co. v. DePasquale and Richmond Newspapers v. Virginia: Re-opening Courtroom Doors and Constitutional Windows*, 10 CAP. U. L. REV. 101, 113-14 (1980); Note, *A Right of Access to a Criminal Courtroom: Gannett Co., Inc. v. DePasquale*, 51 U. COLO. L. REV. 425, 434 (1980).

129. 443 U.S. at 392-93.

of a "reasonable probability of prejudice."¹³⁰ *Richmond Newspapers* relied on the fact that no findings were made by the trial court. In light of the fact that the transcript of the hearing to close the trial in *Richmond Newspapers* shows that the trial judge believed that the rights of the defendant would be infringed,¹³¹ Burger must have considered the element of a lack of findings crucial. If *Richmond Newspapers* suggested a standard for trial closures more stringent than a "reasonable probability of prejudice," it would be overruling *Gannett*. The transcript makes it appear the trial judge in *Richmond Newspapers* believed there was at least a reasonable probability of prejudice. To keep the two cases consistent, the principle of *Richmond Newspapers* would have to be that there is a right to attend trials unless the trial court articulates a belief that there is either a reasonable probability of prejudice to the defendant or some other reason to close the trial. This is the result even though the tone of *Richmond Newspapers* seems to be very protective of the press.¹³² In other words, *Richmond Newspapers* is consistent with *Gannett* only when *Richmond Newspapers* is read for its narrowest possible holding—that findings are crucial.

An even more disturbing use of precedent by Burger was his treatment of the right of access cases. *Gannett* recognized that *Houchins*, *Pell*, and *Saxbe* were relevant to the right to attend trials.¹³³ Burger distinguished the cases by noting that access to prisons is generally limited. The access cases stood for the principle that the government has no duty to allow the press access to gain information. Indeed, Burger's opinion for the Court in *Houchins* said that there is "no discernible basis for a constitutional duty to dis-

130. *Id.* at 393.

131. The trial court stated: "[I]f I feel that the rights of the defendant are infringed in any way, . . . and it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion [to close the trial]." 448 U.S. at 561 (quoting transcript of Sept. 11, 1978, Hearing on Motion to Vacate, 20 (alterations by author)). The trial court apparently believed the defendant's rights would actually be infringed in an open trial and was not merely speculating that there was a "reasonable probability" of infringement.

132. Newspapers immediately read *Richmond Newspapers* in such a press protective fashion. The New York Times, for instance, suggested in an editorial that *Richmond Newspapers* had limited *Gannett* to only pretrial proceedings. N.Y. Times, July 3, 1980, § A, at 18, col. 1. A news article in the St. Louis Post-Dispatch said the decision permitted closed trials only as a last resort and that *Gannett* applied only to pretrial settings. St. Louis Post-Dispatch, July 2, 1980, § A, at 1, col. 1 (two star final ed.). For an explanation of why the trial/pretrial difference is not the main point of distinction between *Richmond Newspapers* and *Gannett*, see text accompanying notes 78 and 127 *supra*.

133. 433 U.S. at 391-92.

close,"¹³⁴ and "this Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."¹³⁵ Burger did not say whether *Houchins* was overly broad or *Richmond Newspapers* has applications beyond the courtroom. Although *Richmond Newspapers* is consistent with the *Houchins* holding, Burger did not explain the apparent inconsistency with the dicta.

The Chief Justice's disposal of the press access cases is especially puzzling when it is examined in light of the cases on which he relied to find the right of attendance. Although his citation of cases dealing with trials is certainly appropriate, he also relied on a commercial speech and a visas-for-Communists case. He cited *First National Bank v. Bellotti*¹³⁶ for the proposition that the first amendment "prohibit[s] government from limiting the stock of information from which the members of the public may draw."¹³⁷ *Bellotti*, however, did not deal with information generated by the government; it dealt with restrictions on communications made by a private party.¹³⁸ Burger also cited *Kleindienst v. Mandel*¹³⁹ for the proposition that there is a right to receive information and ideas.¹⁴⁰ *Mandel* seems inapposite in that it dealt with a federal statute denying visas to foreign Communists and the act was upheld. Even if these cases were on point, one would expect Burger to reconcile *Houchins* with these propositions.

Burger also used the public forum line of cases to support a right of access to trials.¹⁴¹ This was the concept on which Stewart relied exclusively. Burger failed to relate this analysis to his "historical right of access" analysis.

In summary, Burger's use of precedent makes it difficult to divine a neutrally applied principle. He ignored the implications in the opinion most on point—*Gannett* (that some showing of prejudice warrants closure). He relied on cases which were not on point for broad statements of an absolute right to gather information (*Bellotti* and *Mandel*), and then he distinguished cases which

134. 438 U.S. at 14.

135. *Id.* at 9.

136. 435 U.S. 765 (1978).

137. 448 U.S. at 576 (quoting *Bellotti*, 435 U.S. at 783).

138. *Bellotti* dealt with a challenge by a bank of a Massachusetts criminal statute which prohibited certain expenditures by banks for the purpose of influencing the vote on referendums. The Court found the statute unconstitutional.

139. 408 U.S. 753 (1972).

140. 448 U.S. at 576 (quoting *Mandel*, 408 U.S. at 762).

141. *Id.* at 577-78.

appear to be on point (*Houchins*, *Pell*, and *Saxbe*) and concluded by pointing out that the right is qualified after all. It is hard to determine what principle Burger is even attempting to apply, so that nothing more is left than the holding that a judge has to say why he is closing a trial.

Stevens, who dissented in *Houchins*, thought that *Richmond Newspapers* stands for a principle of access to government generally.¹⁴² Nevertheless, he joined Burger's opinion. Stevens did not explain why he joined Burger's opinion, but he must have realized that Burger in *Richmond Newspapers* was not overruling Burger in *Houchins*. Archibald Cox believes Stevens deliberately misstated the breadth of Burger's opinion in an attempt to influence the future course of the law in this area.¹⁴³

Blackmun is another post-Warren Court appointee whose opinion is of questionable legitimacy. He concurred only in the judgment, but stated he felt it was "obvious" the first amendment interests of the public were abridged.¹⁴⁴ His first amendment analysis was very brief. It was limited to a statement that the public has a need and right to know about the administration of justice.¹⁴⁵ The thrust of Blackmun's opinion was an expression of regret that the sixth amendment was not made the basis for the access right, as he had argued it should be in his dissent in *Gannett*. He considered the first amendment analysis only a "secondary position."¹⁴⁶

One can compare Blackmun's opinion to White's. White agreed with Blackmun that *Gannett* was wrongly decided. However, he felt that in light of *Gannett*, the first amendment issue had to be addressed, and he joined Burger's opinion on that issue.¹⁴⁷ Blackmun, on the other hand, refused to contribute to resolution of the first amendment issue. His own analysis was superficial, and he failed to join any of the three analyses offered for reversing the closure order. Blackmun is refusing to let the *Gannett* dissent die; he said we must live with the first amendment analysis "at least for now."¹⁴⁸ Blackmun could have contributed more to an understand-

142. *Id.* at 583.

143. Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 25 (1980).

144. 448 U.S. at 604.

145. *Id.*

146. *Id.*

147. *Id.* at 581-82.

148. *Id.* at 603.

ing of the law of trial closure by joining either Burger, Brennan, or Stewart, thereby making the Court's decision slightly less splintered.

3. *Future Usefulness of the Principle*

As might be surmised by the discussion of the application of the principle used in *Richmond Newspapers*, the principle of the case is not very helpful for future application.

In order to reconcile *Richmond Newspapers* and *Gannett*, *Richmond Newspapers* must be read narrowly. *Gannett* held that a reasonable probability of closure, a failure by reporters to object, and availability of a transcript later justified closing a trial. In *Richmond Newspapers* the last two factors were present, and a transcript of the closure hearing showed the trial court's belief that the defendant's right would be infringed by an open trial.¹⁴⁹ The Court was simply ordering findings on the record, but without offering any guidance to lower courts on how to balance the public's versus the defendant's rights. Lower courts will have a difficult time developing a consistent body of law.

Lower courts are already having difficulty. In a case from the Eighth Circuit, that court said closure would be allowed only when "*strictly and inescapably necessary* in order to protect the fair trial guarantee"¹⁵⁰ in cases in which the prosecution opposes closure. A concurring opinion from that circuit, in a post-*Richmond Newspapers* case, argued for expansion of that standard to all closure orders.¹⁵¹

Although it seems hard to believe, the Burger Court reached out for a moot case to produce a plurality decision that was so narrow it added no principle to the law of trial closures other than that a trial judge has to say why he is closing the trial. Even this narrow, almost useless,¹⁵² principle cannot command a majority on the Court. The question may be asked why the Justices bothered.

VI. ADDITIONAL CRITICISM

When *Richmond Newspapers* is subjected to the scrutiny exer-

149. See note 131 *supra*.

150. *United States v. Powers*, 622 F.2d 317, 322 (8th Cir.), *cert. denied*, 449 U.S. 837 (1980) (court's emphasis).

151. In *In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676, 679-80 (8th Cir. 1980) (Gibson, J., concurring), the court overturned a voir dire closure order.

152. This narrow principle has had, nevertheless, at least one application. The Eighth Circuit reversed an order of the trial court to close voir dire because the trial court had failed to articulate for the record reasons for the closure order. *Id.* at 678.

cised by Kurland, Bickel, and Wechsler, the Burger Court looks little better than the Warren Court. Nevertheless, *Richmond Newspapers* shows a problem with the Burger Court that was not among the criticisms of the Warren Court: the practice of the present Justices to produce individual opinions. The seven Justices who favored reversal in *Richmond Newspapers* produced six opinions and no majority.

Burger's opinion does little to assist lower courts in applying *Richmond Newspapers*. The lack of a majority makes it even more difficult. Stevens, for instance, suggested that *Richmond Newspapers* will have relevance in out-of-court settings. The opinion of Brennan, joined by Marshall, used an analysis that could be applied to out-of-court settings. The contribution of these concurrences to the development of the law is unclear because none of those three Justices were with a majority in the non-press-protective prison access cases.

White and Blackmun concurred to express their belief that the sixth amendment right is dispositive. They concurred in the use of the first amendment because they had to do so to achieve the desired result. Blackmun appears ready to abandon *Gannett* if the opportunity arises. These two concurrences will not contribute to the development of the law since the Court has already rejected the sixth amendment argument advanced in *Gannett*.

Justice Stewart emphasized that there are limits on the right of attendance, but he did not define them. He, too, could have contributed more to the development of the law by joining one of the other opinions. Instead, he leaves lawyers to ponder the exact basis for his inability to join Burger's public forum analysis as they try to predict how he will decide future cases.

Stewart and Blackmun did not write opinions which had unique, comprehensive analyses of the law of trial closures. Had they joined one of the two opinions that were distinct in analysis—Burger's or Brennan's—there would have been an opinion with at least four Justices and perhaps a majority. Even a four-person plurality would have been helpful since Justice Powell, who did not participate, could make a majority in the next case.¹⁵³

The proclivity toward producing concurring opinions is not a problem confined to *Richmond Newspapers* under the Burger

153. Powell's lack of participation could be another reason why the Court should not have reached out for a moot case.

Court.¹⁵⁴ The Burger Court has produced more plurality opinions than have been produced in the entire prior history of the Court and more than twice as many plurality opinions as the Warren Court.¹⁵⁵ Plurality opinions require a change in traditional case analysis. Instead of looking for the holding of a case, one must use a scorecard to predict, based on concurrences, how each Justice will decide a case which is slightly different from the studied case. Besides the difficulty of predicting accurately, this practice deinstitutionalizes the law. It promotes disrespect for the Supreme Court by emphasizing that there is not a clear concept of the law that nine wise men can grasp, but instead varies from Justice to Justice according to his personal perspective.¹⁵⁶

A plurality opinion, especially one with as many concurrences as *Richmond Newspapers*, does nothing more toward explaining the law than would a summary affirmance or reversal or a per curiam opinion. A plurality opinion, like a summary opinion, has future application only to an identical set of facts. Kurland, Bickel, and Wechsler criticized the Warren Court for per curiam decisions,¹⁵⁷ but the Burger Court's concurrences are just as great an impediment to constitutional adjudication.¹⁵⁸

154. Archibald Cox calls the use of concurrences a characteristic of the present Court. Cox, *supra* note 143, at 24.

155. The Burger Court had produced 88 plurality decisions through the 1979 term. The Warren Court produced 42. All previous Courts produced a total of 45. Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1127 n.1 (1981).

156. The supreme court of at least one state has recently expressed this sentiment of seeing United States Supreme Court decisions as subjective opinions of individuals. In a disbarment proceeding the attorney-respondent asked the Missouri Supreme Court to follow the four part test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), to determine if Missouri rules restricting attorney advertising were constitutional. The Missouri Supreme Court stated:

We are urged now by respondent to follow the *Central Hudson* model. We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court. See *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) (the compelling state interest test); and *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d (1980) (the imposition of the death penalty).

In re R.M.J., 609 S.W.2d 411, 412 (Mo. 1981), *rev'd*, 102 S. Ct. 929 (1982). The Missouri court also delivered a more subtle insult. Rather than describing the four part test of *Central Hudson* with a quote from that case, the court quoted a National Law Journal article instead. 609 S.W.2d at 412. The quote from the article did not provide a special insight. It merely tracked the language of the opinion.

157. See text accompanying notes 42-50 *supra*.

158. Wechsler may have felt otherwise. Commenting on the obscenity per curiam decisions, he stated:

I realize that nine men often find it easier to reach agreement on result than upon reasons and that such a difficulty may be posed within this field. Is it not prefera-

VII. CONCLUSION

The Warren Court was criticized for its departure from what one of its defenders, Judge Skelly Wright, calls the "scholarly tradition."¹⁵⁹ Writers such as Kurland, Bickel, and Wechsler criticized the Warren Court for unprincipled, result-oriented decisions. *Richmond Newspapers* shows that the criticisms of the Warren Court are applicable to the Burger Court. The decision cursorily explained the derivation of the constitutional right to attend trials, misused precedent, failed to develop a principle of law for neutral application, and failed to provide guidance to lower courts when reaching the holding of the case. The Court reached out for a moot case to produce multiple opinions without a majority view, with even the plurality being too narrow to be helpful. Furthermore, the Court, even in a narrow decision like *Richmond Newspapers*, continues to fail to reach consensus, causing more confusion in the law and disrespect for the Supreme Court as an institution.

Kurland concluded his Warren Court critique with a challenge to the next Court: "The Nixon Court has awesome tasks before it: to match the Warren Court attainments in the protection of individuals and minorities that today justifies the Court's existence; to restore the confidence of the American public in the rule of law. One or the other is not enough."¹⁶⁰ Evaluation of the Court's record on the first point is left to others. With regard to restoring confidence in the law, according to the standards used by Warren Court critics, *Richmond Newspapers* indicates the Burger Court has failed.

ble, however, indeed essential, that if this is so the variations of position be disclosed?

Wechsler, *supra* note 8, at 21.

159. Wright, *supra* note 9.

160. P. KURLAND, POLITICS, *supra* note 9, at 206.